(1) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DONALD M. HUBERTY,

-Petitioner,

v.

TERRY SOETEBER, Director of Josephine County Juvenile Department; THE OREGON BOARD OF ARCHITECT EXAMINERS; and JOSEPHINE COUNTY, a political subdivision of the State of Oregon,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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83pp

QUESTIONS PRESENTED

I. Did the Ninth Circuit improperly expand *Heffron* to apply to free speech activity which exclusively consisted of handing out political fliers, despite Supreme Court authority that distinguishes such activity from solicitation and proselytizing?

II. Did the Ninth Circuit ignore the traditional evaluation of the validity of time, place and manner restrictions on free speech rights by improperly analyzing each prong of the test?

III. Does a conflict exist between the Circuit Courts on analyzing challenges to a fair's booth rule, in light of *Heffron*?

IV. Did the District Court misinterpret Supreme Court authority in finding that the county could not be liable under § 1983 for the unconstitutional policy which arose based on the county having delegated ultimate decision-making authority for this policy to the fair board?

V. May county and state officials collude in a malicious prosecution, without probable cause, to silence criticism?

VI. Should knowingly false testimony be allowed to obstruct justice and gain summary judgment?

VII. Should lower court decisions be reversed if the rule giving non-moving party evidence favorable interpretation is violated repeatedly?

VIII. Will many of the thousands of state and county fairs further restrict free speech if the Ninth Circuit is not reversed?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the U.S. Court of Appeals for the Ninth Circuit were

Donald M. Huberty
Plaintiff-Appellant

Terry Soeteber, Director of Josephine County Juvenile Department, the Oregon Board of Architect Examiners, and Josephine County, a political subdivision of the State of Oregon
Defendants-Appellees

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The Memorandum of the United States Court of Appeals for the Ninth Circuit, filed May 17, 2000, appears in the Appendix to the Petition for Writ of Certiorari ("App.") at 1-3. The Order of the Ninth Circuit, sitting *en banc*, denying the Petition for Rehearing, filed July 5, 2000, appears at App. 54.

The District Court for the District of Oregon's orders granting summary judgment to Defendants, and the Findings and Recommendations relied upon by the District Court, are at App. 4-53. The Oregon State board of Architectural Examiner's Final Order, dated January 28, 1994, dismissing the Matter of the Proposed Assessment of Civil Penalty against Don Huberty, is at App. 55.

All of these opinions are unpublished.

JURISDICTION

The court of appeals entered its opinion on May 17, 2000, followed by its order denying petition for rehearing on July 5, 2000. Pursuant to Supreme Court Rule 13, this petition for Writ of Certiorari is filed within 90 days of the order denying rehearing. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. 1 (excerpt)

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

F.R.C.P. Rule 56, Summary Judgment

(g) **Affidavits made in Bad Faith**. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

A. The Malicious Prosecution

The Petitioner's right of free speech regarding an issue of great public concern was violated by Josephine County and Oregon State officials in 1993. The issue originally involved the planning and construction of a juvenile detention facility with adjacent courtroom and staff offices. By 1993 the need for this facility had existed for at least fifteen years, and although a lot of public money and county staff time had been spent, there was nothing to show for all the money and effort. Those in charge of planning were county Juvenile Director Terry Soeteber and Architect Ron White who worked on the Project under many different county contracts. After the election of November 1996, it finally dawned on the Board of County Commissions (B.C.C.) of Josephine County that Soeteber and White were incompetent for the task as proven by their many failures. Able people were appointed as replacements and the buildings were soon completed.

For years, Petitioner had exercised his free speech rights guaranteed by the First Amendment of the United States Constitution, and he had been an outspoken critic of Soeteber and White's planning. Despite their lack of progress they had the support of the B.C.C. for eighteen years before their removal.

In March 1993, Soeteber and White obtained a small sketch of the proposed building site that Petitioner had prepared in conjunction with his request for a city feasibility study of the site. They discussed Petitioner's possible illegal practice of architecture in the presence of the

city planner on March 19, 1993. Later in March 1993 Architect White obtained the tacit approval from his County superior and sole client Director Soebeter, to forward a letter to the Oregon Board of Architecture Examiners (O.B.A.E.) complaining of Petitioner's illegal practice of architecture, based on the aforementioned sketch. Both Soebeter and White knew the probable consequences of this malicious act.

Eleanor Gundran, Administrator for O.B.A.E., without an investigation of this obviously fraudulent charge of illegal practice, threatened multiple $5,000 civil fines and possible criminal action against Petitioner if he did not "immediately cease." Petitioner and other interested citizens recognized this threat as an attempt by Josephine County Officials to stifle Petitioner's public input on the juvenile detention facility planning.

The B.C.C. would not intervene to prevent the malicious prosecution by O.B.A.E. Much time, money and legal defense effort was required to clear Petitioner of the bogus charge of "illegal practice of architecture." It took ten months to overcome the retaliation efforts of the county for engaging in what was clearly protected First Amendment free speech. In 1994 this lawsuit was filed with the hope of protecting other citizens from attack for exercising their constitutional rights. For six years the Defendants' tactics have prevented a jury trial. This caused the federal courts to inadvertently encourage corrupt and illegal attacks on the civil rights of private citizens.

All Defendants sought summary judgment to prevent a trial that would expose great waste, incompetence and

abuse of power by county and state officials. A trial would also uncover carefully hidden cases of juvenile rape and drowning while in the care of the county juvenile authorities.

The Defendants, now Respondents, never defended their actions by showing they were acting in the public interest. The Defendants have pleaded that they should not be held accountable because various legal theories justify whatever they did and they should be immune from all liability. None have admitted to any wrongdoing. All have acted in bad faith by knowingly giving false affidavits and depositions thus demonstrating their contempt for the American justice system. Petitioner has filed enormous quantities of proof documenting this bad faith which the District Court and the Court of Appeals have ignored. Federal Courts should not condone bad faith.

The District Court correctly stated that evidence must be viewed favorably to the party opposing summary judgment, yet this has not happened. Instead many years of delay and clever legal maneuvering have masked Respondents' dishonesty. Petitioner is told that Federal Judges are over-burdened and over-worked and that explains both courts' decisions that have rewarded improper and possibly criminal behavior.

Please consider these examples of dishonesty in securing summary judgment. Defendants O.B.A.E. and Gundran testified falsely that O.B.A.E. had no liability insurance to cover a judgment. Judge Cooney said it was necessary to protect the funds in the Oregon Treasury

from liability judgments. Through a very thorough personal investigation Petitioner discovered documents that proved there was tort claim insurance and that a separate insurance fund had a cash reserve of over twenty million dollars ($20,000,000.) When this dishonesty was exposed, the Oregon Department of Justice lawyers tried to rationalize away the previous misstatements. Defendants had misinformed the court and obstructed justice and despite proof of this they were rewarded by summary judgment. Both the District Court and the Appellate Court ignored this documented evidence of bad faith violations of F.R.C.P., Rule 56(g).

Another of many bad faith violations concerns the affidavits of County Commissioners and the Juvenile Director. They stated under oath that they were not involved in the complaint by Architect White that caused the malicious prosecution by O.B.A.E. or supplying any documents to aid the O.B.A.E. prosecution. Many official, uncontested documents were filed proving the County defendants used the Josephine County Juvenile Advisory Council (J.C.J.A.C.) to fraudulently obtain a large floor plan sketch by Petitioner on April 30, 1993 at a public meeting. The sketch was immediately forwarded to O.B.A.E. who used this drawing as the primary evidence in their unsuccessful effort to fine Petitioner $5,000, or more, in their malicious prosecution of October 1993. The B.C.C., Soeteber and White all knowingly helped to obtain this sketch by corrupt, dishonorable and illegal means. Attentive finders of fact will quickly see through the false testimony of Defendants regarding the April 30, 1993 public meeting and the sketch arriving at O.B.A.E. May 5, 1993. None of these efforts to get the sketch could

have occurred without the active intentional help of the County Defendants who controlled the Juvenile Advisory Council. Evidence on record below, including a letter from Bill Reddick (App. 8) along with other documents prove the defendants have not been truthful and have obstructed justice.[1]

Many of Petitioner's suggestions to improve juvenile detention planning were adopted by the county later. A superior site recommendation, a reduced number of buildings, smaller square footage, larger number of detention beds and double occupancy cells were adopted because they were superior ideas and the B.C.C. was embarrassed because they did not think of them. Petitioner asks for a Writ of Certiorari to prove that our orderly, nonviolent system of justice does work for ordinary citizens.

B. The Suppression of Free Speech Rights.

In the primary election of May 1996 Petitioner won the right to a run-off against Commissioner Harold Haugen, incumbent since 1980. Petitioner campaigned for votes by leafleting with pocket sized fliers. Hoping to win the general election of November 1996, Petitioner distributed many thousand leaflets on private property, at shopping centers and house to house. He leafleted on public property, at city and county parks, on sidewalks and the outside steps of the Post Office at the busiest hours. This

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[1] All such meetings, both regular and special, were planned, noticed and advertised on official Josephine County Juvenile Directors' stationery and signed by Soeteber.

leafleting was not legally challenged as leaflets were merely offered to interested citizens. He obstructed, harrassed or interfered with no one.

In August 1996 the Josephine County Fair attracted thousands of citizens to the county Fairgrounds. Petitioner paid admission and leafleted for about two hours in the Grange Building without incident or complaint by any fairgoer. Others leafleting inside the Grange Building were not challenged, harassed or arrested, although Petitioner was. The Grange is a political organization with roots in 17th century rural America. Copies of two Grange leaflets are part of the court records below. Other individuals also were allowed to leaflet at the fair outside of booths without arrest including the County Sherriff and the mayor of Grants Pass, Oregon.

The Fair Director ordered Petitioner's arrest for trespass with the prior approval and knowledge of the B.C.C. The incumbent Commissioner gained enormous unfair political advantage by the arrest and the November election may have been stolen August 15, 1996. Petitioner was not prosecuted by the County District Attorney for trespass as he knew the arrests were unconstitutional. As matters currently stand it is a safe, effective election strategy for incumbents to have their employees and colleagues arrest but not prosecute a political challenger for leafleting at any county fair.

The exact same commissioners that falsely testified that they were not involved in the 1993 malicious prosecution by O.B.A.E. again lied under oath regarding the 1996 leafleting arrests. Proof of this is to be found in the court record. A transcript of the August 16, 1996 meeting

in the Fair Director's office was voice recorded. County Counsel Steve Rich volunteered that Commissioner Irv Whiting rushed into his office and said approvingly, "They are arresting Huberty as we speak." This admission proves the commissioners were in contact with the Fair Director and the arresting officers and gave their support to, and failed to try to prevent, the fraudulent, politically motivated arrest.

Commissioner Haugen's affidavit of March 31, 1999 is partly false as proven in the court record yet the Ninth Circuit failed to view the evidence in a light most favorable to Petitioner. Petitioner's Excerpts of Record filed with the Ninth Circuit prove the Fair Director also gave false testimony regarding his employer, who pays his salary and who controls the Josephine County Fair and its policies. All of the above-described false statements caused this case to be wrongfully dismissed.

REASONS FOR GRANTING THE PETITION

A. THE SUPPRESSION OF FREE SPEECH RIGHTS.

I. THE NINTH CIRCUIT IMPROPERLY EXPANDED *HEFFRON* TO APPLY TO FREE SPEECH ACTIVITY WHICH EXCLUSIVELY CONSISTED OF HANDING OUT POLITICAL FLIERS, DESPITE SUPREME COURT AUTHORITY TO THE CONTRARY THAT DISTINGUISHES SUCH ACTIVITY FROM SOLICITATION AND PROSELYTIZING.

In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) the free speech activity at-

issue included soliciting donations, selling religious literature and proselytizing (at 647). The State of Minnesota had established the need to control the flow of traffic at the State Fair. As a result, the content-neutral "booth rule" was justified as a reasonable time, place and manner restriction (*id.* at 647-648).

In *United States v. Kokinda*, 497 U.S. 720 (1990), the Supreme Court found that simply handing out a flier to someone does not impact foot traffic in the same way as solicitation, in contrast to the activity that was involved in *Heffron*.

> . . . Solicitation impedes the normal flow of traffic. See *Heffron, supra* at 653, 69 L Ed 298, 101 S.Ct. 2559. . . . See also *United States v. Belsky*, 799 F.2d 1485, 1489 (ca11 1986) ("soliciting funds is an inherently more intrusive and complicated activity than is distributing literature."). . . . One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide and act in order to respond to a solicitation. Solicitors can achieve their goal only by "stopping [passerby] momentarily or for longer periods as money is given or exchanged for literature" or other items. *Heffron, supra* at 653. . . .

(*Kokinda, supra* at 733-734)

The District Court's opinion in Petitioner's case confirms that the only free speech activity involved for Petitioner was handing out a flier related to his candidacy for county commissioner (App. 43). Based on *Kokinda*, Petitioner's activity did not impact traffic and thus was not in conflict with Josephine County's goal "to ensure that

fairgoers may walk through the Fair's thoroughfares unimpeded." (App. 42). This justification given by Josephine County for the Fair's policy is not supported by the record as applied to Petitioner. Based on *Kokinda*, it appears the District Court's reliance on *Heffron* (App. 50-53) was inappropriate because of the different First Amendment activities involved, and their significantly different impact on traffic flow. Unfortunately, despite *Kokinda*, the Ninth Circuit relied on *Heffron* and stated: "The minor factual distinctions that Huberty raises do not persuade us otherwise." (App. 3).

In the event that the Josephine County's "booth rule" was content-neutral,[2] it would still result in an unconstitutional infringement of free speech rights. In upholding the constitutionality of the booth rule, the Ninth Circuit ignored the long established precedent that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the pleas that it may be exercised in some other place." (*Schneider v. Irvington*, 308 U.S. 147, 163 (1939)).

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[2] It may be important to note that the booth rule in this case consisted of an oral policy. It was not until after Petitioner's arrest that the Josephine County Fair Board first adopted a written policy. (App. 43).

II. THE NINTH CIRCUIT GUTTED THE TRADITIONAL EVALUATION OF THE VALIDITY OF TIME, PLACE AND MANNER RESTRICTIONS ON FREE SPEECH RIGHTS BY IMPROPERLY ANALYZING EACH PRONG OF THE TEST.

The traditional evaluation requires upholding as reasonable time, place and manner restrictions "if they are content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communications" (citing *Heffron* and *United States v. Griefen*, 200 F.3d 1256, 1260 (9th Cir. 2000)) (App. 3). While Petitioner does not dispute that this is an accurate recitation of the law, he disputes that the Ninth Circuit properly analyzed the facts of this case pursuant to this constitutional framework.

The Josephine County Fair's restriction was not content-neutral as applied to Petitioner. At the time that Petitioner was arrested for handing out fliers, there were other people nearby, also outside of booths, who were handing out fliers. After Petitioner's arrest, he returned to the Fair to get the names of witnesses to his arrest. The people who had been handing out fliers in the same area where Petitioner had been were still there, undisturbed, handing out fliers. (*See* Grange flier; App. 56).

As discussed above, Petitioner had been an outspoken critic on issues of public interest in Josephine County. That was his impetus for running against an incumbent Commissioner. That is why Petitioner was singled out and arrested in a very public place and paraded around the Fair in handcuffs, for violating the unwritten "booth

rule" by distributing his campaign flier at the Fair.[3] That is why Josephine County failed to stop any of the other persons at the Fair who were also handing out fliers at the same time and place as Petitioner.

The Josephine County Fair policy was clearly not content-neutral as applied, and *Heffron* does not control. In *Eagon through Eagon v. City of Elk City, Okl.*, 72 F.3d 1480, 1487 (10th Cir. 1996) the court of appeal distinguished its case from *Heffron* on that basis.[4]

The Josephine County Fair policy fails the second prong insofar as it was not narrowly tailored to serve a significant governmental interest (*Heffron, supra* at 647). (See Discussion above at 10-11, re *Kokinda*.).

Lastly, the Josephine County Fair policy failed to leave open ample alternatives for communications. Some of the booths for rent at the Fair were situated in an

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[3] The arresting officer was told by the Fair Director to escort Petitioner from the fairgrounds if he was seen handing out fliers based on the County's unwritten "booth rule". The arresting officer later testified at his deposition that this was the only time he had arrested anyone for handing out fliers at the fair (App. 43 and 51). The fact that the County Fair's policy was unwritten raises the question of whether the arresting officer had probable cause to arrest Petitioner, and whether that arrest violated Petitioner's First Amendment right to free speech and civil rights under 42 U.S.C. § 1983 (*City of Los Angeles v. Heller*, 475 U.S. 796 (1986); *Grossman v. City of Portland*, 33 F.3d 1200, 1203-1204 (9th Cir. 1994).

[4] The Supreme Court should grant review, and ultimately reverse and remand this case to the District Court for trial on the correct standard for a discriminatory as-applied First Amendment challenge (*Widmar v. Vincent*, 454 U.S. 263, 269-270 (1981); *United States v. Grace*, 461 U.S. 171, 176-182 (1983)).

undesirable area so as to effectively deny the boo renters' access to the majority of fairgoers. These undes able booths were offered to those whose message was favored by the Fair Director, i.e., Huberty; whereas th were booths in desirable locations which were offered those whose message was favored by the Fair Director one's message was disfavored by the Fair Director, th really were no alternatives for meaningful communi tion.[5] While *Heffron* upheld a first-come, first-serv booth rule, Petitioner knows of no case which has uph an unwritten policy which was discriminatorily appli

III. IT APPEARS THAT A CONFLICT EXIS BETWEEN THE CIRCUIT COURTS ON ANAL ING CHALLENGES TO A FAIR'S BOOTH RU IN LIGHT OF *HEFFRON*.

In *Edwards v. Maryland State Fair and Agricultu Society*, 628 F.2d 282 (4th Cir. 1980), the court of app addressed a challenge to the booth rule at the Maryla State Fair brought by the Krishnas. The Fourth Circ held that this booth rule was an unconstitutional abri ment of the Krishnas' First Amendment rights. Howev unlike in *Heffron*, the Fourth Circuit found that the rec did not establish that the rule was necessary for cro control and to further the state's interest in public saf (i.e., freedom from fraud) (*Edwards, supra* at 286).

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[5] On August 17, 1993, after his arrest, when Hube attempted to leaflet outside the main entrance to the Fair, was pushed, shoved and otherwise assaulted by the F Director and Deputy Sheriff Officers.

In *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430 (2nd Cir. 1981), the court of appeal addressed the same issue regarding the state fairs in New York. The Second Circuit concluded that the booth rule was unconstitutional as applied to the Krishnas and that there were "constitutionally preferable" means to address the state's concerns about fraudulent solicitation (*id.* at 447).

Under either one of these appellate court cases, the booth rule in Josephine County would have been found to be an unconstitutional infringement on Petitioner's rights of free speech. Josephine County failed to establish how Petitioner's conduct in simply handing out leaflets had any impact on traffic flow. The *Edwards* case and the district court ruling in *Barber* were mentioned in a long list of cases cited in *Heffron* as evidence of the inconsistent treatment of these issues in various courts (*Heffron, supra* at 646 n.9). Despite the readily available opportunity to do so, the Supreme Court did not expressly overrule these cases. However, the validity of both of these cases has been called into question by later decisions in light of *Heffron* (i.e., *ISKCON v. Schmidt*, 523 F.Supp. 1303 (D.Md. 1981); and *see ISKCON, Barber, supra,* at 447 (Oakes, J. concurring). Yet it appears that neither *Edwards*, nor *Barber* has been overruled. This indicates an unsettled area of law that the Supreme Court should resolve.

IV. THE DISTRICT COURT MISINTERPRET SUPREME COURT AUTHORITY IN FINDI THAT JOSEPHINE COUNTY COULD NOT HELD LIABLE UNDER § 1983 FOR THE POL OF ITS FAIR BOARD.

The District Court's May 27, 1999 Order (App. 40 relied upon two issues for granting summary judgm It found that Plaintiff had failed to establish a tri issue regarding (1) whether the County was a pro defendant under 42 U.S.C. § 1983 (App. 49); and whether the supposedly content-neutral policy was a sonable time, place and manner restriction (App. 51- The Ninth Circuit affirmed the latter issue and ne reached the former (App. 2-3).

It remains Petitioner's contention that Joseph County is a proper defendant based on the follow *Monell v. Department of Social Services of the City of York*, 436 U.S. 658, 690 (1978) held that municipalities other local government units were "persons" subjec liability under § 1983 actions. The District Court held since there was no *respondeat superior* liability fo municipality under *Monell*, Josephine County could be liable (App. 45-47). This ignores a vital aspect *Pembaur v. Cincinnati*, 475 U.S. 469, 483-484 (1986), wh attempted to refine the critical distinction between official's exercise of discretion as opposed to an offici exercise of final policymaking authority for whic municipality may be liable. In *Pembaur*, the Supr Court gave the following example of this distinctio

> . . . If county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability . . . even if the Board left the

> Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions would represent county policy and could give rise to municipal liability. (*Id.* at 483 n.12.)

Pembaur also reconfirmed the holding in *Monell*, that even a single act of a governmental entity can form the basis for liability under § 1983 (*Pembaur*, at 480-481). Under the above authority, Petitioner, at a minimum, established that there was a triable issue as to whether the Josephine County Commissioners had delegated their power to establish final fair policy to the Fair Board, thus the Fair Board's "decisions would represent county policy and could give rise to municipal liability." (*Pembaur*, at 483 n.12) (6-10; App. 45-53).

There is conclusive proof that B.C.C. is the final policy maker for Josephine county, the Fair and Fairgrounds. It is found in the Josephine County Charter which was admitted and filed in the court record of the Ninth Circuit Court of Appeals.

B. MALICIOUS PROSECUTION

Despite the Ninth Circuit's Memorandum affirming the summary judgment in favor of Defendants on this cause of action (App. 2), Petitioner is confident that an abundance of evidence is in the court record proving that County Defendants supplied a large drawing to O.B.A.E. which had been prepared by Petitioner. That drawing

was the primary evidence used in the malicious prosecution by O.B.A.E. The resulting prosecution was a joint effort by Josephine County officials and O.B.A.E. officials to prosecute for reasons other than those alleged. County and O.B.A.E. officials knew with absolute certainty that Huberty's political input to improve the progress and planning of a juvenile detention facility was not the illegal practice of architecture. Rather, it was obviously protected free speech. For his efforts the Petitioner was maliciously prosecuted, however, he was cleared after ten months of litigation.

The Defendants have repeatedly given false testimony to secure the District and Appellate Courts' dismissal of Petitioner's case. That evidence was not viewed in the light most favorable to the non-moving party. Despite Petitioner's evidence to the contrary, the courts accepted the affidavits of county and state defendants as true.

It is undisputed that the prosecution went forward and finally resulted in Petitioner being cleared of illegal practice. (App. 55). Petitioner's evidence establishes that without the county's intervention and assistance, O.B.A.E. probably would not have prosecuted.

The prosecution was almost totally based on the larger drawing fraudulently obtained by the J.C.J.A.C. at the April 30, 1993 public meeting. The implication is that the State of Oregon would not have chosen to prosecute without the additional evidence of the large drawing. It appears O.B.A.E. was determined to prosecute Huberty because their dues-paying, county-supported, member

requested the fraudulent action, despite the lack of probable cause. They prosecuted to silence a critic of a state licensed architect who was later declared by B.C.C. to be incompetent.

Petitioner has vainly sought a jury trial for over six years. Justice and accountability suffer when a jury trial is denied. The trial would expose wrongdoing by O.B.A.E. and Josephine County Defendants. Even in the unlikely event that the jury found the County Defendants were not involved in the illegal prosecution, it is highly probable that a trial would cause over one hundred Oregon professional regulating and licensing boards to be more careful to avoid an abuse of their power with unwarranted attacks on citizens without probable cause. It is failed justice and inverted reasoning to protect public agencies because the county officials falsely claim to be uninvolved with actions resulting in the malicious prosecution and other egregious wrongdoings.

CONCLUSION

In considering this petition, it is important to note that the Supreme Court was deeply divided in *Heffron* regarding informational leafleting being equated with the sale of religious literature. The court should use *Huberty v. Josephine County* to clarify this very significant First Amendment issue. Thousands of county and state fairs will be informed of the Supreme Court's decision through Fair Association magazines and the fairs may further restrict First Amendment Rights if the Ninth Circuit Court of Appeals is not reversed.

For all of the foregoing reasons, the petition for a Writ of Certiorari should be granted. The lower courts' decisions should be reversed and this case should be remanded for a jury trial on the issues.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD M. HUBERTY, Plaintiff-Appellant, v. TERRY SOETEBER, Director, Josephine County Juvenile Department; JOSEPHINE COUNTY, a political subdivision of the State of Oregon, Defendants-Appellees.	No. 99-35671 D.C. No. CV-94-03037-JPC MEMORANDUM[1] (Filed May 17, 2000)

Appeal from the United States District Court
for the District of Oregon
John P. Cooney, Magistrate Judge, Presiding

Submitted March 31, 2000[2]

Before: CHOY, WALLACE, and SKOPIL, Circuit Judges.

Donald M. Huberty brought this civil rights action alleging (1) malicious prosecution and (2) violation of his right to freedom of speech. The district court granted

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

summary judgment to defendants. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

DISCUSSION

1. Malicious Prosecution

Huberty brought this civil rights action alleging malicious prosecution after being charged by the Oregon Board of Architect Examiners (OBAE) of unlawfully practicing architecture. We agree, however, with the district court that Huberty failed to submit evidence that the county defendants caused him to be prosecuted. Under Oregon law, a plaintiff is required to demonstrate that the proceedings at issue were initiated without probable cause by defendants and were terminated in favor of the plaintiff. *See Rogers v. Hill*, 576 P.2d-328, 331 (Or. 1978). Here, Huberty did not submit sufficient evidence to create a triable issue whether county defendants contacted the OBAE, supplied any information to the OBAE, or encouraged anyone to commence proceedings against him. Accordingly, the district court did not err by granting summary judgment to the county defendants on Huberty's claim of malicious prosecution.

2. First Amendment Claim

Huberty contends that Josephine County violated his constitutional rights to free speech by enforcing a policy that regulated the dissemination of literature at the county fair. Although the district court ruled that Josephine County was not responsible under state law for the activities at the county fair, we conclude that it is not

necessary to address this purely state law issue. Rather, we agree with the district court's alternative ruling that the policy at issue is a constitutional time, place and manner restriction.

There is no dispute that Huberty was engaged in protected speech when he sought to distribute political literature at the county fair. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). Such speech may be regulated, however, by imposition of reasonable time, place and manner restrictions. *See Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *United States v. Griefen*, 200 F.3d 1256, 1260 (9th Cir. 2000) (noting that such restrictions are valid if they are content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communications). In *Heffron*, the Supreme Court reviewed a policy substantially similar to the one enforced at the Josephine County Fair and concluded that the policy was a constitutional time, place and manner restriction. We agree with the district court that *Heffron* controls this case. The minor factual distinctions that Huberty raises do not persuade us otherwise.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONALD M. HUBERTY,
Plaintiff,
v.
RONALD D. WHITE, Architect, P.C.; et al.
Defendants.

Civil No. 94-3037-CO

ORDER

(Filed Oct. 26, 1998)

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COONEY, Magistrate Judge:

This is a 42 U.S.C. § 1983 civil rights action brought by plaintiff Donald M. Huberty. In his second amended and supplemental complaint, plaintiff includes a claim for violation of civil rights under § 1983 against defendants Ronald D. White, Terry Soeteber, and Josephine County, and a claim for violation of civil rights under

§ 1983 against Josephine County Plaintiff seeks special damages, general damages, punitive damages, and attorney's fees. This court has jurisdiction pursuant to 28 U.S.C. § 1331. The parties have executed written consents for entry of final judgment by a magistrate judge. 28 U.S.C. § 636(c). Before the court is a second motion for summary judgment by defendants Terry Soeteber and Josephine County. Defendants were given leave to redraft or amplify their motion to address any new claims alleged in the second amended complaint, which the court allowed plaintiff to file after defendants had filed their motion for summary judgment, but defendants did not file any additional briefing after the second amended complaint was filed.

I. FACTS

In making the following findings, the court considers the evidence in the light most favorable to plaintiffs:

Plaintiff Donald Huberty is a retired builder from California who moved to Grants Pass, Oregon in 1990. Plaintiff felt compelled to help the government be more economical, more respected, and to make his country a stronger and better place. (Huberty Dep. At 29-32.) Plaintiff became an outspoken critic on several matters of local government because of his building background and because of his perception that nobody with a building background was criticizing plans proposed by Josephine County government which plaintiff believed wasted "millions and millions of dollars." (Huberty Dep. At 33.)

Defendant Terry Soeteber has been the Director of the Josephine County Juvenile Department since 1973. He has been employed by Josephine County longer than any of the current sitting members of the Board of County Commissioners. Defendant Soeteber has been closely involved with the project of designing and constructing a juvenile detention facility in Josephine County. (Soeteber Aff. At 2; Whiting Off. At 2; Haugen Aff. At 2; Borngasser Aff. At 2.)

One of the building plans for a juvenile detention facility which plaintiff criticized was a plan submitted to the voters in 1990. Plaintiff believed after studying the plan throughout the summer of 1990 that he "knew more about it than anyone else in the county." (Huberty Dep. At 34.) Plaintiff's principal objection to the proposed plan was that the facility was overpriced, and the government was not receiving good value for the money. As such, he felt that the County was wasting tax dollars in a haphazard fashion. (Huberty Dep. at 60.) Ultimately, Josephine County voters rejected the tax levy for the construction of the proposed juvenile facility in November 1990. (Huberty Dep. At 66.)

After the voters decided against the plan proposed by the County, plaintiff took it upon himself to design a small juvenile lockup facility, which he offered to build and finance himself, and suggested that the County could repay over time from the operating costs it would save. The County Commissioners considered plaintiff's proposal, but determined that it was not feasible. (Huberty Dep. at 69, 71-73, 83-84.)

In 1992, defendant Josephine County, through it's architect, defendant Ronald White, began to draw up new plans for the juvenile detention facility. Once again, plaintiff felt that the plan was imprudent and voiced his objection to the proposed plan. As part of his objection to the proposed plan, plaintiff submitted a sketch or drawing of his own proposed floor plan for a detention facility, to the City of Grants Pass in March 1993, along with a preapplication for site review for the proposed juvenile facility. (Huberty Dep. at 85-87, 98-101.)

On March 19, 1993, defendants Soeteber and White went to the Grants Pass Planning Department to file a preapplication for the juvenile facility. At that time, Jim Huber, Grants Pass City Planner, advised the two that plaintiff had just submitted a preapplication for development. When defendants Soeteber and White were shown the preapplication with a crude sketch attached submitted by plaintiff, they were "disturbed," and defendant White mentioned that plaintiff might be practicing architecture without a license. (Huber Aff. At 2; 9-28-93 Huber letter.)

On March 31, 1993, Eleanor Gundran, Administrator of the Oregon Board of Architecture Examiners (OBAE), received a letter from defendant White, along with a copy of the preapplication and drawing for the Board's review. (Gundran Aff. Ex. 1.) Defendant White states: "I did file an inquiry with the Oregon Board of Architect Examiners (OBAE) against DONALD M. HUBERTY for the practice of architecture without a license. I initiated and filed the inquiry." (White Aff. At 2.) Before defendant White sent his letter to Gundran at the OBAE, he called her to discuss the situation. During their discussion, Gundran

and White agreed that White would send her the letter and drawing for the Board's review. Defendant White told defendant Soeteber that he was going to submit the preapplication and drawing to the OBAE before he sent it, and defendant Soeteber expressed no disapproval. (White Dep. At 41-42; 63; Soeteber Aff. At 3.)

Gundran responded to defendant White's letter by advising plaintiff that since he had filed an application for development and designed plans for a proposed juvenile facility while not currently registered as an architect, he was in violation of Oregon laws governing the practice of architecture. She advised plaintiff to cease all such unauthorized actions or he would be subject to a civil fine for the unauthorized practice of architecture. Plaintiff responded by letter to Gundran dated April 26, 1993, that he would "not alter my efforts to get Josephine County the best possible juvenile facility." (Gundran Aff. Exs. 2, 3.)

Bill Reddick, a member of the Josephine County Juvenile Advisory Council, invited plaintiff to come to a meeting on April 30, 1993, to present his ideas. The meeting was a joint meeting of the Juvenile Advisory Council and the board of the Inn Between, a nonprofit corporation with whom Josephine County contracted to provide juvenile shelter services, at which defendants Soeteber and White were present. During the meeting, plaintiff used a larger and more detailed drawing of his original sketch to illustrate his ideas. White obtained a copy of the sketch and sent it to Gundran at the OBAE, where it was date-stamped on May 5, 1993. (Huberty aff. At 11; Huberty Dep. At 113-14; Gundran Aff. Ex. 6; White Dep. At 17-18; Soeteber Aff. At 2.)

The Josephine County Commissioners denied that any meeting of the Juvenile Advisory Council occurred on April 30, 1993. All three commissioners responded in writing to plaintiff's written questions regarding a meeting and prosecution by the OBAE. (Huberty letters received by Board of Commissioners on 5-11-93; 5-25-93 letter from County Commissioners to Huberty.)

In a letter dated May 3, 1996 [sic], Gundran informed plaintiff in response to his request for the name of the person who filed the complaint against him, that no one had suggested to the Board that plaintiff be charged with anything, and that the Board takes action on their own when a violation is noted. (Gundran Aff. Ex. 5.)

On June 8, 1993, Gundran advised plaintiff that the Board had found it necessary to issue a notice of a hearing and a proposed assessment of civil penalty for the unauthorized practice of architecture. (Gundran Aff. At 2.) However, no fine or penalty was ever assessed against plaintiff. (Huberty Dep. At 128.)

Defendant Soeteber often insulted plaintiff at public meetings, and interfered with his ability to speak; he told plaintiff to "get the hell out of here," when plaintiff came to a site visit where Soeteber, White, and a real estate agent were present. (Hubert Aff. At 5-6; White Dep. At 56-57.)

Defendant White considered plaintiff to be a nuisance to him and to the whole process. Defendant White claims to have no concern that his contract might have been threatened by plaintiff, but admitted that the OBAE action was taken to protect his professional turf. (White

Dep. At 52, 63.) Defendant White maintained a continued interest in the prosecution of plaintiff and to the best of his recollection, he called Gundran to obtain a copy of the proposed order issued by the hearings officer. (White Dep. At 45-46.)

After plaintiff filed this lawsuit, defendant White's attorney tendered the defense of the action to Josephine County based on the theory that White had been acting on behalf of the county when he turned plaintiff into the OBAE. (Carreon Aff. At 4.)

Josephine County Commissioners have interfered with plaintiff's efforts to speak at public meetings, and have been accused of falsely justifying silencing him by claiming disruptive conduct. (Whiting Aff. At 2; Haugen Aff. At 2; Borngasser Aff. At 2; Huberty Aff. At 6; Ausland Aff. At 2; Quiring Aff. At 1-3.) Commissioner Borngasser singled plaintiff out at a public meeting at a private vineyard where the juvenile facility was to be discussed, and demanded that he pay a donation or leave. (Huberty Aff. At 7; Ausland Aff. At 2.)

II. LEGAL STANDARDS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). The moving party must carry the initial burden of proof. *Celotex Corp. v.*

Catrett, 477 U.S. 317, 322-24 (1986). The moving party meets this burden by identifying for the court portions of the record on file which demonstrate the absence of any genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 322-24; *Bhan*, 929 F.2d at 1409. In assessing whether a party has met its burden, the court must view the evidence in the light most favorable to the non-moving party. *Allen v. City of Los Angeles*, 66 F.3d 1052 (9th Cir. 1995). All reasonable doubts must be resolved in the non-movant's favor. *Intel Corp. v. Hartford Accident and Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

If the moving party meets its burden with a properly supported motion, the burden then shifts to the opposing party to present specific facts which show there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Intel Corp.*, 952 F.2d at 1558; *Auvil v. CBS "60 Minutes"*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996); *See Anderson v. Liberty Lobby, Inc.*, 5477 U.S. 242, 250 & n.4 (1986). If the moving party presents evidence which, taken by itself, would establish the right to a directed verdict at trial, the motion for summary judgment must be granted, in the absence of any significant probative evidence tending to support the opposing party's theory of the case. *THI-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991, 993-94 (9th Cir. 1980); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290, *reh'g denied*, 393 U.S. 901 (1968). Conclusory allegations, unsupported by factual material, are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts which show

there is a genuine issue for trial. *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1994).

III. DISCUSSION

In his second amended and supplemental complaint, plaintiff brings a claim against all defendants for civil rights violation under § 1983, alleging violation of the First Amendment and Fourteenth Amendment freedom of speech, freedom from humiliation, intimidation, and harassment; and a claim against defendant Josephine County for civil rights violation under § 1983 for violation of the First Amendment.[1]

The County defendants contend that: defendant Soeteber is entitled to dismissal because the suit is against him in his official capacity, that is, it is against Josephine County only; even if defendant Soeteber is sued in his personal capacity, he is entitled to qualified immunity; defendant Soeteber never initiated any proceedings against plaintiff; and defendant Josephine County has no custom or policy to silence citizens, single them out for prosecution, or subject them to groundless prosecution.

The court will first address defendants' arguments that defendant Soeteber did not initiate any proceedings against plaintiff and defendant County took no action with respect to defendant White's complaint to the OBAE

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[1] In his second amended and supplemental complaint, plaintiff also dismissed the State defendants, Eleanor Gundran and the OBAE, and dismissed the state claims against defendant White.

or set any unconstitutional policy, which was the only issue addressed at the telephone hearing of defendants' motion.

As an initial matter, the court will address plaintiff's assertion made at the telephone hearing that the court had already found on the first motion for summary judgment by defendants that there was evidence of malicious prosecution.[2] The only issue raised in the prior motion for summary judgment by defendant as to plaintiff's claim for § 1983 malicious prosecution was whether plaintiff must satisfy the "special injury" element to state a claim. The court found that "special injury" must be shown and that evidence presented by plaintiff satisfied that element of the claim. The court did not find, as plaintiff appears to contend, that evidence was presented which satisfied all elements of a claim for § 1983 malicious prosecution.

Defendants argue that defendant Soeteber never contacted the OBAE, he never supplied any information to the OBAE, and he never encouraged anyone, including defendant White, to commence any proceedings against plaintiff. Defendants further contend that when a board or district attorney decides to take action on its own, the party supplying the information cannot be held liable for malicious prosecution. Plaintiff argues that personal participation is not the only predicate for § 1983 liability, and

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[2] The parties have referred to plaintiff's claim as one for malicious prosecution. It appears that plaintiff's claim is more properly characterized as one for wrongful use of a civil proceeding. *See* Retatement (Second) of Torts §§ 674, 680 (1977).

anyone who causes a citizen to be subjected to a constitutional deprivation is also liable. Plaintiff asserts that there is evidence which supports defendant Soeteber's participation and encouragement of White to initiate the prosecution.

This court found on defendants' first motion for summary judgment that to state a claim for § 1983 malicious prosecution, plaintiff must allege all elements of the state tort of malicious prosecution and allege a deprivation of constitutional rights: to state a claim for malicious prosecution under state law, plaintiff must plead and prove:

> "(1) A private person who initiates criminal proceedings against another who is not guilty of the offense charged is liable to him for the harm done thereby if the proceedings
>
> (a) were initiated
>
> (i) without probable cause, and
>
> (ii) primarily because of a purpose other than that of bringing an offender to justice, and
>
> (b) A private person who procures the institutional of criminal proceedings against another is liable under the conditions stated in Subsection (1)"

Shoemaker v. Selnes, 220 Or. 573, 577 (1960) (quoting 3 Restatement of Torts § 653).[3]

The Oregon Supreme Court in *Rose v. Whitbeck*, 277 Or. 791, 796, *on reh'g*, 278 Or. 463 (1977), held that a defendant may be liable for malicious prosecution for

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[3] *See* Restatement (Second) of Torts §§ 674, 680 (1977), relating to claims for wrongful use of a civil proceeding.

initiating or continuing a prosecution without probable cause if he takes some active part in instigating or encouraging the prosecution. (Citing Prosser, Law of Torts § 119, at 836-37 (4th ed. 1971)). However, where the prosecutor after an independent investigation decides to prosecute, a defendant will be insulated from liability. An exception exists where pertinent information is withheld or misrepresentations are made as to the facts, or undue influence is used. *Id.* at 797 (citing Restatement of Torts § 653 (1960), *adopted by Humbert v. Knutson*, 224 Or. 133, 138-40 (1960)); Restatement of Torts § 653 cmt. g). The court in *Humbert*, stated:

> A person may institute a criminal proceeding, as the word "institute" is used in a case of malicious prosecution, by either signing the charge himself or inciting or procuring another to do so. This other may be a private individual or a public officer. However, if it is a public officer and a full, complete and accurate disclosure is made to the officer and no undue influence is used upon him, thus leaving the decision to prosecute entirely to the officer's uncontrolled discretion, there is no liability on the part of the private informant if the charge proves to be false. This is true even though the prosecution is without probable cause and the matter was brought to the attention of the officer through malice. If pertinent information is withheld or there are misrepresentations made as to the facts, or undue influence brought to bear, there can be no intelligent exercise of the officer's discretion, and the person thus procuring the action of the officer is not insulated from responsibility.

224 Or. At 137-38 (case citations omitted (citing Proser on Torts § 98 (2d ed.); Restatement of the Law of Torts § 653 cmt. g)). The *Humbert* court found no evidence that defendant there had withheld any vital information, misrepresented any facts to the officers, or that there was any undue influence present and, therefore, defendant was not liable for malicious prosecution. The court found that, for public policy reasons, defendant was not responsible even in if defendant had acted with malice. 224 Or. At 140-41.

Here, defendants refer to the affidavits of defendant Soeteber, Gundran, and defendant White, to support their contention that defendant Soeteber did not initiate any proceedings against plaintiff, and even if he had, the OBAE made its own decision to prosecute plaintiff. Defendant Soeteber states:

> At no time did I direct Mr. White to file a complaint with the [OBAE] against Mr. Huberty for the practice of Architecture without a license, or in any way encourage Mr. White to make such a complaint. . . . [par.] Furthermore, at no time did I contact the OBAE or communicate with anyone associated with the OBAE. I have never supplied any information, drawings, sketches, or any other such document to the OBAE concerning Mr. Huberty or Mr. White, or in any way encouraged the prosecution of Mr. Huberty by the OBAE.

(Soeteber Aff. At 3.) Defendant White states in his affidavit that, "I did file an inquiry with the [OBAE] against DONALD M. HUBERTY for the practice of architecture without a license. I initiated and filed the inquiry." (White Aff. At 2.) Gundran, the administrator of the

OBAE, responded to plaintiff's request for the name of the of the [sic] person who filed the complaint against him that, "no one has suggested to the Board [] that you be charged with anything. The Board takes action on their own when a violation is noted." (Gundran Aff. Ex. 5.) While plaintiff offers evidence that defendant Soeteber did not disapprove of filing a complaint against plaintiff, and from which it can be inferred that he might have encouraged White to file a complaint and initiate an inquiry with the OBAE, plaintiff does not offer any evidence to counter defendants' evidence that the OBAE prosecuted plaintiff on its own after determining that a violation had been committed by plaintiff. Plaintiff presents no evidence that defendant White, who filed the inquiry with the OBAE, withheld facts, misrepresented facts, or used undue influence in reporting to Gundran and the OBAE, or that Soeteber did so, to come within the exception.

On the evidence before the court, even if defendants Soeteber acted with malice and encouraged defendant White to instigate an inquiry and initiation of proceedings by the OBAE, the court finds that defendant Soeteber is insulated from any liability for malicious prosecution. While it may be true, as plaintiff asserts, that a person who causes another to be subjected to a constitutional deprivation can be found liable by setting in motion events which he reasonably should know would cause another to inflict the constitutional injury, *see Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978), the evidence indicates that plaintiff cannot satisfy a requisite element to prove § 1983 malicious prosecution – that the proceedings were instituted at the instance of defendant Soeteber

– to state a claim for malicious prosecution against him under state law. Defendants' motion is granted as to defendant Soeteber.

Defendants argue that plaintiff has no evidence to contradict the affidavits of the county commissioners that the County did not have a policy, custom, or practice to file charges against plaintiff for speaking out on matters of public concern. Defendants argue that there is no evidence that the commissioners took any action with respect to defendant White's complaint to the OBAE or that they set any unconstitutional policy. Defendant County further argues that, even if defendant Soeteber's involvement is believed, such was a single random event for which the County cannot be held liable. Defendants assert that defendant Soeteber had no policymaking authority with respect to making charges on behalf of defendant Josephine county against citizens to state agencies. Defendants argue that there is no evidence suggesting that the County's statutory decision makers, the commissioners, even knew of the complaint by defendant White or defendant Soeteber's alleged acquiescence. Defendants also argue that plaintiff fails to show that there were any prior incidents of county officials depriving anyone of rights under the First amendment or improperly subjecting them to any kind of prosecution. Plaintiff argues that defendant Josephine County on numerous occasions has restricted plaintiff's freedom of expression at public meetings. He argues that Soeteber, as director, has policy making authority and, therefore, there is no immunity to the County. Plaintiff contends that a single decision by a policy maker can establish policy. Plaintiff asserts that the action taken against plaintiff was

tacitly authorized policy of defendant Josephine County. Plaintiff asserts that there is sufficient evidence to show that the County had a custom or policy of silencing people who protested County meetings.

On the record before the court, it seems clear that defendant Josephine County did not institute anything with the OBAE against plaintiff regarding the practice of architecture. The court has found, on the record before it, that plaintiff cannot establish a requisite element to prove malicious prosecution under state law, that of initiation of proceedings by defendant Soeteber. Therefore, assuming for purposes of this motion only, that defendant Soeteber is a policy maker for the County, which issue the court need not determine at this time, the evidence is insufficient to show that he initiated any proceedings against plaintiff and, thus, no wrongful action by defendant Soeteber can be attributed to defendant Josephine County. Accordingly, defendants' motion as to defendant Josephine County is granted.

IV. ORDER

Based on the foregoing, it is ordered that the motion for summary judgment by defendants Soeteber and Josephine County as to plaintiff's first claim for section 1983 civil rights violation-malicious prosecution is granted.

DATED this 26 day of October, 1998.

/s/ John P. Cooney
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONALD M. HUBERTY, Plaintiff, v. ELEANOR GUNDRAN, Administrator of the Oregon Board of Architect Examiners; et al., Defendants.	Civil No. 94-3037-CO FINDINGS AND RECOMMENDATION (Filed June 17, 1997)

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COONEY, Magistrate Judge:

Plaintiff Donald M. Huberty filed this 42 U.S.C. § 1983 civil rights action claiming that defendants conspired and prosecuted him for the unlawful practice of architecture without just cause and with the intent to deprive him of his federal rights. Plaintiff also includes state law claims. Plaintiff seeks special and general damages, punitive damages, and attorney's fees. This court has jurisdiction pursuant to 28 U.S.C. § 1331. All defendants have filed motions for summary judgment. The court granted plaintiff's request to complete certain discovery, and allowed him to file supplemental materials. Plaintiff has filed supplemental materials and the state defendants have renewed their motion for summary judgment.

I. FACTS

In making the following findings, the court considers the evidence in the light most favorable to plaintiffs:

Plaintiff is a retired builder of houses who moved to Grants Pass, Oregon in 1990. Plaintiff felt he had important work in "helping government to be more economic, more respected, and to make my country a stronger and better place." (Huberty Dep. At 29-32.) He became an outspoken critic on several matters of local government because of his building background and because of his

perception that nobody with a building background was criticizing plans proposed by Josephine County government, and plaintiff believed that "millions and millions of dollars" were about to be wasted. (Huberty Dep. At 33.)

Defendant Soeteber is Director of the Josephine County Juvenile Department. He has been involved in preparation of a design proposal and construction of a juvenile detention facility in Josephine County. (Soeteber Aff. at 2.)

Defendant White is a licensed architect in Oregon, with whom defendant County contracted to provide architectural design services for a juvenile detention facility. (White Aff. At 1; Soeteber Aff. at 2; Hubert Aff. Exs. 1, 2, 3.)

Defendant Gundran is the Administrator of the Oregon Board of Architecture Examiners (OBAE). (7-25-96 Gundran Aff. At 1.) All money received by the OBAE is deposited into a checking account controlled by the State Treasurer. The OBAE places a rubber-stamp endorsement on all checks payable to the OBAE before depositing them. There is no other bank or other depository account from which any obligation of the OBAE could be satisfied. No board member had authority to write checks on the account into which OBAE receipts are deposited. No Board employee, other than defendant Gundran, has authority to write checks on the account into which OBAE receipts are deposited. Defendant Gundran only has authority to write checks on that account to issue refunds of application fees to candidates who do not qualify to sit for the licensing examination. For all other OBAE obligations, such as a bill for goods or services

purchased by the OBAE, defendant Gundran forwards the bill and an authorization for payment to the Budget and Accounting Division of the Oregon Department of Administrative Services (DAS). Personnel at DAS then prepare a check drawn on the State Treasury, and forward the check to defendant Gundran to use to pay the bill in question. (7-25-96 Gundran Aff. At 5-6, Exs. 7-9.) If plaintiff obtains a judgment against the OBAE in this case, the judgment will be paid by a check drawn on the State Treasury. (Munn. Aff. At 2.)

Plaintiff was critical of building plans in 1990 for a jail and juvenile detention center. Plaintiff believed after studying the plan throughout the summer of 1990 that he "knew more about it than anyone else in the county." (Huberty Dep. At 34.) Plaintiff's principal objections to the proposed plan was that the jail and juvenile facility was overpriced. He felt that people want to see tax dollars handled frugally and not wasted in a haphazard fashion. (Huberty Dep. at 60.) The tax levy for the construction of the proposed juvenile facility plan was submitted to the Josephine County voters and was rejected. (Huberty Dep. at 66.)

Plaintiff designed a small juvenile lockup facility, which he offered to build and finance himself, and suggested that the County could repay over time from the operating costs it would save. The County Commissioners considered plaintiff's proposal, but rejected it. (Huberty Dep. at 69, 71-72.)

In 1992, defendant County's architect, defendant White, drew up new plans for the juvenile detention facility. Plaintiff felt that the plan was imprudent and

voiced his objection to the proposed plan. Plaintiff submitted a preapplication for site review, with a sketch, to the City of Grants Pass in March 1993. (Huberty Dep. at 85-87, 98-101; Huberty Aff. Ex. 17.) According to defendant White, submission of a preapplication is not the practice of architecture. (White Dep. At 14.)

On March 31, 1993, defendant Gundran received a letter from defendant White, along with a copy of the preapplication and drawing. Defendant Gundran advised plaintiff by letter that records did not show that he was currently registered as an architect, and the preparation and filing of plans were contrary to Oregon law. Defendant Gundran advised plaintiff to cease all such unauthorized activities or he would be subject to a civil penalty for each occurrence of the unauthorized practice of architecture. Plaintiff responded by letter that he would "not alter my efforts to get Josephine County the best possible juvenile facility." (5-30-96 Gundran Aff. At 2 & Exs. 1, 2, 3.)

In a letter dated May 3, 1996 [sic], defendant Gundran informed plaintiff in response to his request for the name of the person who filed the complaint against him, that no one had suggested to the OBAE that plaintiff be charged with anything, and that the OBAE takes action on their own when a violation is noted. (5-30-96 Gundran Aff. At 2 & Exs. 4, 5.)

Plaintiff was invited by Bill Reddick, a member of the Josephine County Juvenile Advisory Council, to speak on April 30, 1993, before a joint meeting of the Juvenile Advisory Council and the board of the Inn. Between a

non-profit corporation with whom Josephine County contracted to provide juvenile shelter services, for the purpose of allowing plaintiff an opportunity to present his proposal for a juvenile detention facility. (Soeteber Aff. At 2; Huberty Dep. At 113-18; Huberty Aff. At 11, Ex. 9.) During the meeting, plaintiff presented an enlarged drawing of the floor plan with additional details. (Huberty Dep. At 113-14, 154; 5-30-96 Gundran Aff. At 2 & Ex. 6.)

Following the April 30th meeting, defendant Gundran received a copy of plaintiff's drawing presented at the meeting. (5-30-96 Gundran Aff. At 2.) Defendant White sent a copy of the drawing presented at the meeting to defendant Gundran. (White Dep. At 17-18.)

On June 8, 1993, defendant Gundran advised plaintiff by letter that the OBAE had found it necessary to issue a notice of a hearing and a proposed assessment of civil penalty for the unauthorized practice of architecture. (5-30-96 Gundran Aff. At 2.) The Hearings Officer found in a Proposed Order dated November 29, 1993, that plaintiff's "drawing is a sketch used to communicate a political idea. . . . " He concluded that plaintiff did not violate ORS 671.020. Defendant OBAE adopted the Proposed Order of the Hearings Officer on January 28, 1994. No penalty was ever assessed against plaintiff. (Huberty Dep. At 128; Huberty Aff. At 14, Exs. 17, 18.)

According to plaintiff, "this experience" damaged him in that he was frustrated in his efforts to communicate with the public; his ability to obtain opportunities to speak at public gatherings have been decreased; and his ability to trade freely in the marketplace of ideas in the

local community has been adversely affected. (Huberty Aff. At 14.)

II. LEGAL STANDARDS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). The moving party must carry the initial burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). The moving party meets this burden by identifying for the court portions of the record on file which demonstrate the absence of any genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 322-24; *Bhan*, 929 F.2d at 1409. In assessing whether a party has met its burden, the court must view the evidence in the light most favorable to the non-moving party. *Allen v. City of Los Angeles*, 66 F.3d 1052 (9th Cir. 1995). All reasonable doubts must be resolved in the non-movant's favor. *Intel Corp. v. Hartford Accident and Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

If the moving party meets its burden with a properly supported motion, the burden then shifts to the opposing party to present specific facts which show there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Intel Corp.*, 952 F.2d at 1558; *Auvil v. CBS "60 Minutes"*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1567 (1996); *see Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 & n.4

(1986). If the moving party presents evidence which, taken by itself, would establish the right to a directed verdict at trial, the motion for summary judgment must be granted, in the absence of any significant probative evidence tending to support the opposing party's theory of the case. *THI-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991, 993-94 (9th Cir. 1980); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290, *reh'g denied*, 393 U.S. 901 (1968). Conclusory allegations, unsupported by factual material, are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts which show there is a genuine issue for trial. *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1994).

III. DISCUSSION

In his first amended complaint, plaintiff claims that all defendants conspired to deprive him of his civil rights in violation of his First Amendment speech rights, as well as his Fourteenth Amendment substantive and procedural due process and equal protection rights. Plaintiff also includes state claims for defamation and malicious prosecution against defendant Ronald D. White.

Eleventh Amendment

State defendant OBAE argues that it is a state agency entitled to dismissal under the Eleventh Amendment. Plaintiff was given leave to complete certain depositions to address defendant OBAE's argument and to submit

supplemental materials to the court. However, plaintiff does not address this argument in the supplemental materials submitted.

In the absence of express consent by the state, the Eleventh Amendment to the United States Constitution bars actions against the state or its agencies or departments by a citizen of the state, regardless of the relief sought. *Welch v. Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 472 (1987); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) *Papasan v. Allain*, 478 U.S. 265, 276 (1986); *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 677 (9th Cir. 1991); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1442-43 (9th Cir. 1989). The Supreme Court has held that the enactment of 42 U.S.C. § 1983 was not intended to overcome a state's Eleventh Amendment immunity from suit. *Edelman v. Jordan*, 415 U.S. 651, 675 (1974). However, suit against a state agency is not barred if it is shown that the agency operates independently of the state. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394, 404-05 (1994).

> To determine whether a governmental agency is an arm of the state, the following factors must be examined: whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity. To determine these factors, the court looks to the way state law treats the entity.

Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989) (citations omitted). Whether the state would be responsible for paying a judgment is the determinative factor. *Hess*, 513 U.S. at ___, 115 S. Ct. At 404-05; *Rutledge v. Arizona Bd. Of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983) [the source of the funds is "the most important single factor"]; *Alaska Cargo Transport, Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 380 (9th Cir. 1993). The state agency has the burden of persuasion of demonstrating Eleventh Amendment immunity. *ITSI TV Prods., Inc. v. Agricultural Ass'ns*, 3 F.3d 1289, 1291-92 (9th Cir. 1993).

The OBAE was created by state law. ORS 671.120. The Governor appoints its members. ORS 671.120. In order to practice architecture in the state, a person must qualify before the board and obtain a certificate of registration, pursuant to statute. ORS 671.020. The OBAE promulgates rules prescribing the standards of professional conduct for architects. ORS 671.125. The OBAE may be sued in state court, ORS 30.260 et seq., and may institute proceedings in state court for injunctive relief, ORS 671.220(2). State defendants offer evidence that all money received by the OBAE is deposited into a checking account controlled by the state treasurer; no OBAE member has authority to write checks on the account; no OBAE employee has authority to write checks on the account except defendant Gundran, who has authority only to issue refunds of application fees; all other OBAE obligations must be forwarded for payment to the Oregon Department of Administrative Services, which prepares a check drawn on the state treasury. The Risk Management

Division of the Oregon Department of Administrative Services manages liability claims against the state of Oregon, including all of its agencies, boards, commissions, officers, employees, and agents. ORS 278.120, 278.005(12); (Munn Aff. At 1.) State defendants offer the affidavit of William Munn, Chief Claims Specialist with the Risk Management Division, who is personally responsible for management of the claim that gave rise to this litigation. He states that, "if plaintiff obtains a judgment against the Oregon Board of Architectural Examiners in this case, the judgment will be paid by a check drawn on the State Treasury." (Munn. Aff. At 2.)

The "most important single factor" – that any judgment be satisfied from the state treasury – is met here. Applying the factors to the evidence presented, the court finds that defendant OBAE has shown that it operates as an agency of the state. Accordingly, it is entitled to Eleventh Amendment immunity, and should be dismissed from this action.

The Eleventh Amendment " 'is a limitation on federal subject-matter jurisdiction.' " *Draper v. Coombs*, 792 F.2d 915, 919 (9th Cir. 1986) (quoting *Demery v. Kupperman*, 735 F.2d 1139, 1149 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985)). Subject matter jurisdiction cannot be waived, and can be raised at any time. Fed. R. Civ. P. 12(h); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975). Although defendant Gundran does not raise the Eleventh Amendment as a bar to the claims against her, the court is obligated to consider the matter, and may raise the issue *sua sponte*, Fed. R. Civ. P. 12(h); *Draper*, 792 F.2d at 919; *In re Mooney*, 841 F.2d 1003, 1009 (9th Cir. 1988).

An action against a state officer in his or her official capacity for retroactive relief, i.e., damages, is a suit against the state itself and is barred by the Eleventh Amendment, whereas an action for prospective relief, i.e., injunctive relief, is not barred. *Papasan*, 478 U.S. at 278; *Bair v. Krug*, 853 F.2d 672, 675 (9th Cir. 1988). A suit for damages against a state officer in his individual capacity is not an action against the state and, therefore, is not barred by the Eleventh Amendment. *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974).

Plaintiff does not allege the capacity in which defendant Gundran is sued. Where a complaint against public officials does not clearly specify whether the officials are sued personally, in their official capacity, or in both their official and individual capacities, " 'The course of proceedings' . . . will indicate the nature of the liability to be imposed." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985)). Here, plaintiff identifies defendant Gundran in the caption of the first amended complaint as, "Eleanor Gundran, Administrator of the Oregon Board of Architect Examiners." In the body of the complaint, plaintiff alleges only that, "At all times relevant hereto, defendant Eleanor Gundran was an employee of the Oregon Board of Architect Examiners, acting within the course and scope of her employment, and under color of law." (First Am. Compl. at 2, par. 3.) State defendants admit this in their answer. In referring to defendant Gundran throughout the complaint, in most instances, plaintiff refers to "Gundran and the OBAE."

The Ninth Circuit court in *Bair*, 853 F.2d 672, held that where capacity was not alleged, but individual

defendants were named in the caption of the complaint in their capacity as administrator or director of a division or department, and where there was no indication anywhere in the record that plaintiff "genuinely sought" to impose personal liability for damages on the individuals rather than on the state, and it was clear that any judgment against them would be paid out of the public treasury, the court found that the individual defendants were sued "solely in their official capacities." 853 F.2d at 675. The Ninth Circuit in *Mitchell*, 861 F.2d at 201, found that, because the school district was a dependent instrumentality of the state and the individual defendants were sued in their official capacities, the individual defendants were also entitled to Eleventh Amendment immunity. There, the district court had found that all facts alleged in the complaint related to actions by individual defendants "in their official capacities, acting within the course and scope of their employment" and were entitled to immunity.

There being no allegation that defendant Gundran is being sued as an individual, coupled with plaintiff's allegation that defendant Gundran was acting within the course and scope of her employment at all relevant times, on the record before it, the court finds that defendant Gundran is sued in her official capacity. Accordingly, she is entitled to Eleventh Amendment immunity and should be dismissed from this action.

Conspiracy

Defendants Soeteber and Josephine County and defendant White argue that there is no legal basis or

evidence to support plaintiff's claim that they conspired to violate his First Amendment rights. Defendants assert that plaintiff cannot show either purposeful discrimination or a class-based animus to support a claim under 42 U.S.C. § 1985(3).[1] Plaintiff agrees that class-based animus must be shown to state a § 1985(3) claim, and apparently concedes this issue, but asserts that such animus is not required to state a § 1983 claim. Racial or class-based animus is required to state a claim under § 1985(3). *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971). The court finds that any claim of conspiracy under 42 U.S.C. § 1985(3) by plaintiff should be dismissed.

§ 1983 Malicious Prosecution

Defendants Terry Soeteber and Josephine County (County defendants) and defendant White argues that plaintiff fails to state a claim for section 1983 malicious prosecution.[2] Defendants contend that plaintiff must

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[1] While plaintiff does not specifically allege a conspiracy in violation of section 1985(3), he alleges in his first amended complaint that jurisdiction is invoked pursuant to sections 1983 and 1985.

[2] Plaintiff alleges a claim for section 1983 malicious prosecution against all defendants, and a state claim of malicious prosecution against defendant White only. Although defendant White does not specifically address the state claim against him, his argument concerning the element of "special injury" is equally applicable to his state claim. Therefore, that part of the court's discussion of plaintiff's section 1983 malicious prosecution claim relating to the requisite element of "special injury" to allege a state tort claim applies to the state malicious prosecution claim against defendant White.

allege all elements of the state tort of malicious prosecution, which includes the element of "special injury," to state a section 1983 malicious prosecution claim, and that plaintiff does not satisfy the "special injury" element. Plaintiff contends that he does not have to show "special injury" to state a section 1983 malicious prosecution claim. Plaintiff asserts that, if "special injury" must be shown, he satisfies the element.

In the Ninth Circuit,

> The general rule is that malicious prosecution does not constitute a deprivation of life, liberty or property without due process of law and, therefore, is not cognizable under 42 U.S.C. § 1983. However, an exception to this rule exists for malicious prosecutions conducted with the intent of denying a person equal protection or otherwise subject a person to a denial of constitutional rights.

Cline v. Brusett, 661 F.2d 108, 112 (9th Cir. 1981) (citations omitted); *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985). The United States Supreme Court in *Albright v. Oliver*, 510 U.S. 266, 271 n.4 (1994) noted the " 'diversity of judicial opinion,' " whether a claim for malicious prosecution is actionable under § 1983. The court cites the Ninth Circuit case of *Usher*, 828 F.2d 556, as one example of those circuits which "require a showing of some injury or deprivation of a constitutional magnitude in addition to the traditional elements of common-law malicious prosecution." *Id.* In discussing whether a § 1983 malicious prosecution claim had been stated, the Ninth Circuit in *Usher* noted the exception to the general rule, stated the

elements of a malicious prosecution claim under California state law, and then held that plaintiff's pleading there "fairly bring[s] his common law tort claim of malicious prosecution within the scope of section 1983, under the exception for a malicious prosecution intended to deprive a person of the equal protection of the laws." 828 F.2d at 561-62; *see Haupt v. Dillard,* 17 F.3d 285 (9th Cir. 1994). It appears to the court that for plaintiff to state a claim for section 1983 malicious prosecution, he must allege all elements of the state tort of malicious prosecution, and allege a deprivation of his constitutional rights.

Oregon has adopted the Restatement elements of a claim for malicious prosecution:

> "(1) A private person who initiates criminal proceedings against another who is not guilty of the offense charged is liable to him for the harm done thereby if the proceedings
>
> (a) were initiated
>
> (i) without probable cause, and
>
> (ii) primarily because of a purpose other than that of bringing an offender to justice, and
>
> (b) A private person who procures the institutional of criminal proceedings against another is liable under the conditions stated in Subsection (1)"

Shoemaker v. Selnes, 220 Or. 573, 577 (1960) (quoting 3 Restatement 382, Torts § 653). "[I]n cased involving actions for malicious prosecution, [the Oregon Supreme Court] has long held that there can be recovery only for the kind of extraordinary harm contemplated by the term 'special injury,' which excludes 'the kind of secondary

consequences that are the common and often unavoidable burden on defendants in "all similar causes". ' "*Bob Godrey Pontiac, Inc. v. Roloff*, 291 Or. 318, 333 (1981) (citing cases). The Oregon courts have found this requirement satisfied "when the chosen proceeding itself involved immediate interference with the person, property, income, or credit of the subsequent complainant, apart from the ultimate judgment . . . ," such as the use of garnishment, attachment, or involuntary bankruptcy, or where exceptionally sensitive proceedings are maliciously instituted, such as insanity proceedings. *O'Toole v. Franklin*, 279 Or. 513, 516 (1977). In *Walti v. Willarnette Indus. Inc.*, 86 Or. App. 479, 483 (1987), defendant had obtained a temporary restraining order in the earlier proceeding, restraining plaintiff from visiting a wilderness area which he regularly did, and which forced him to cancel a class he would have taught there. The court found that defendant had "secured an order that restrained [plaintiff] from going somewhere that he, as a member of the public, otherwise had a right to do." *Id.* The court found such restraint sufficient to plead a special injury.

County defendants and defendant White argue that the damages which plaintiff alleges do not rise to the level of the requisite "special injury." Plaintiff alleges damages as follows:

> plaintiff was required to expend attorney's fees, was required to expend much personal time defending against the prosecution, was subjected to unfavorable publicity, and was caused to suffer anxiety, vexation, frustration, and other disturbing mental and emotional states [and]

> expended attorney's fees in the prosecution of this action.

(First Am. Compl. Par. 22.) Plaintiff argues that, if "special injury" is required, he "suffered damage to his constitutional rights of free speech under the First Amendment . . . for the purpose of causing that very damage." (Pl. Mem. In Opp. To Josephine County Mot. at 4.) He argues that defendants White and Soeteber focused on his communicative act and impaired his ability to continue using drawings as communicative aids in the expression of political ideas, which was additional injury "peculiar" to this case. (Pl. Mem. In Opp. To Josephine County Mot. At 5.) In his affidavit, plaintiff states that "this experience" has damaged him in that he was "frustrated in my efforts to communicate with the public"; his "ability to obtain opportunities to speak at public gatherings have been decreased"; and the experience has "injured my ability to trade freely in the marketplace of ideas in the local community." (Huberty Aff. At 14.)

Judge Stewart in *Fleming v. Aho Constr. Co.*, CV-96-1724-ST, slip op. at ___ (D. Or. Mar. 12, 1997), held that the "special injury" element was met where plaintiffs there alleged that defendants had prevented them from doing something they otherwise had a right to do, participating in the land use process. The pendency of the earlier lawsuit allegedly suppressed their activities, and the threat of a lawsuit had some restraining effect. Judge Stewart held that, "The allegation of restraint on their

exercise of their constitutional right is sufficient to satisfy any 'special injury' requirement." (Slip Op. At ___.)[3]

The court finds that plaintiff's evidence that he was frustrated in his ability to speak and participate in public debate, which would appear to include restraint in using drawings to criticize the plans for the juvenile facility, if believed, satisfies the requisite "special injury" to state a state law malicious prosecution claim. In addition, plaintiff pleads and argues that defendants acted with intent to deprive him of his First Amendment rights to speak out, singled him out for prosecution in violation of equal protection, and subjected him to groundless prosecution in denial of Fourteenth Amendment substantive due process, to state a section 1983 malicious prosecution claim. Defendants' motion should be denied on this ground.

IV. RECOMMENDATION

Based on the foregoing, it is recommended that the motion for summary judgment by defendants Oregon Board of Architecture and Gundran be granted and state defendants dismissed, and that the motions for summary judgment by defendants Soeteber and Josephine County and defendant White as to plaintiff's claim of conspiracy under 42 U.S.C. § 1985(3) be granted, and the motions as to plaintiff's claims of section 1983 malicious prosecution and state claim of malicious prosecution be denied.

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[3] Plaintiffs in *Walti* alleged a claim for abuse of process. Judge Stewart stated that it was not clear whether special injury was required for an abuse of process claim, as it was for malicious prosecution, but found that if special injury was required, it was sufficiently alleged. (Slip Op. At ___.)

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 17 day of June, 1997.

/s/ John P. Cooney
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONALD M. HUBERTY,	)	
Plaintiff,	)	Civil No. 94-3037-CO
v.	)	
JOSEPHINE COUNTY,	)	ORDER
Defendant.	)	(Filed May 27, 1999)

COONEY, Magistrate Judge:

This is a 42 U.S.C. § 1983 civil rights action brought by plaintiff Donald M. Huberty. In his only remaining claim in his second amended and supplemental complaint, plaintiff alleges that Josephine County violated his First Amendment rights. Plaintiff seeks general damages, punitive damages, and attorney's fees. This court has jurisdiction pursuant to 28 U.S.C. § 1331. The parties have executed written consents for entry of final judgment by a magistrate judge. 28 U.S.C. § 636(c). Defendant Josephine County has filed a motion for summary judgment. Plaintiff opposes defendant's motion.

I. FACTS

In making the following findings, the court considers the evidence in light most favorable to plaintiff[1]:

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[1] Plaintiff responds to defendant's concise statement with "admit" or "deny," but fails to cite to any evidence for those facts denied, as required by Local Rule 56(c)(1). Plaintiff also

The Josephine County Fair Board (Fair Board) has exclusive jurisdiction and control over the Josephine County Fair. The Fair Board has exclusive jurisdiction and control to make any and all policies for the Fair. The Fair Board is the final policy maker for the Fair.

The Josephine County Board of Commissioners is the final policy maker for Josephine County. The Board of County Commissioners exercises no power or control over the Fair Board or the Fair. Josephine County, through its Board of County Commissioners, has never adopted any policies or rules regarding the Fair. Josephine County, by and through the Board of County Commissioners, has never adopted an express policy or established custom to prohibit citizens from distributing political literature or engaging in electioneering on the Josephine County Fairgrounds property without first obtaining a permit and payment of a booth fee. Josephine County, by and through its Board of County Commissioners, has never had a plan or a policy to take action against plaintiff, Donald Huberty, to prevent him from expressing his opinions in an appropriate forum. Josephine County, by and through the Board of County Commissioners, has never adopted an express policy or established custom to restrict any citizen's First Amendment right to politically campaign at the Fair.

At the time of the incident at issue in this case, on or about August 15, 1996, the Fair Board had an unwritten policy requiring all dissemination or sale of literature,

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submits a separate statement of facts. See Local Rule 56(c)(1), 56(c).

brochures, cards, or handbills, regardless of the content of the material, be done from a rented Fair booth. Anyone wishing to merely walk around the Fair, discussing their views with fair goers, were and are free to do so. The Fair Board's unwritten policy was established as a means of crowd control. Specifically, the policy is to ensure that fair goers may walk through the Fair's thoroughfares unimpeded. The Fair Board applied the above unwritten policy evenhandedly to all those who wished to engage in the above-mentioned activities, regardless of the content of the message. The policy prohibiting distribution of written materials other than from a rented fair booth, an interpretation of the County Fair Exhibitor Contract, was in effect in 1989 when Mr. Westhoff came to the Fair Board. Mr. Westhoff does not know who created the policy.

Prior to August 15, 1996, Mr. Huberty, was informed by the Fair's Manager, Mr. Westhoff, that the Fair Board had a policy prohibiting the distribution of literature or written materials, unless such distribution was done from a rented fair booth.

On or about August 15, 1996, Mr. Westhoff observed Mr. Huberty outside of a rented booth, distributing written literature at the Fair. Mr. Westhoff informed Mr. Huberty that such activity violated the Fair Board's policy and requested that he refrain from distributing materials, but Mr. Huberty refused to comply with Mr. Westhoff's request.

Mr. Westhoff then contacted Vernon Harman, Josephine County Sheriff's Deputy, at the fairgrounds, and requested that, if Deputy Harman should observe Mr.

Huberty passing out literature, to escort him from the fairgrounds.

Thereafter, Mr. Huberty was informed by Deputy Harmon that distributing literature outside of a rented booth was against the Fair rules. Mr. Huberty acknowledged that he was aware of the rule. Deputy Harmon requested that Mr. Huberty cease his activity, yet Mr. Huberty continued to hand out literature. Deputy Harmon requested Mr. Huberty to leave the fairgrounds.

Mr. Huberty was arrested for Criminal Trespass in the Second Degree. Mr. Huberty was issued a Citation to Appear, escorted to the main gate of the fairgrounds, and asked not to return to the fairgrounds that day.

At no time prior to arresting Mr. Huberty did Deputy Harmon witness Mr. Huberty creating any problem with other patrons. Deputy Harman had never removed an individual from the fairgrounds for distributing literature.

On or about October 8, 1996, the Josephine County Fair Board adopted a written policy regarding time, place and manner restrictions on speech, activities, and travel of fairground patrons.

On or about April 8, 1998, the Josephine County Fair Board adopted a further written policy regarding time, place, and manner restrictions for use of fairground property for electioneering, gathering signatures for ballot measure petitions, pamphleting, and other First Amendment purposes.

II. LEGAL STANDARDS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). The moving party must carry the initial burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). The moving party meets this burden by identifying for the court portions of the record on file which demonstrate the absence of any genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 322-24; *Bhan*, 929 F.2d at 1409. In assessing whether a party has met its burden, the court must view the evidence in the light most favorable to the non-moving party. *Allen v. City of Los Angeles*, 66 F.3d 1052 (9th Cir. 1995). All reasonable doubts must be resolved in the non-movant's favor. *Intel Corp. v. Hartford Accident and Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

If the moving party meets its burden with a properly supported motion, the burden then shifts to the opposing party to present specific facts which show there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Intel Corp.*, 952 F.2d at 1558; *Auvil v. CBS "60 Minutes"*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 & n.4 (1986). If the moving party presents evidence which, taken by itself, would establish the right to a directed verdict at trial, the motion for summary judgment must be granted, in the absence of any significant probative evidence tending to

support the opposing party's theory of the case. *THI-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991, 993-94 (9th Cir. 1980); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290, *reh'g denied*, 393 U.S. 901 (1968). Conclusory allegations, unsupported by factual material, are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts which show there is a genuine issue for trial. *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1994).

III. DISCUSSION

In his second amended supplemental complaint, plaintiff alleges that defendant Josephine County, through its Fair Board of Directors, adopted a policy or custom to prohibit citizens from distributing political literature or engaging in electioneering on the County fairgrounds without first obtaining a permit and payment of $275 for a booth. He alleges that he was arrested on August 15, 1996, while, as a political candidate against an incumbent County Commissioner, he was passing out political literature after paying admission to the fairgrounds. (Second Am. Compl. at 9-10.)

Defendant Josephine County contends that it acts through its final policy makers, the Board of County Commissioners, and does not have any custom or policy regarding the distribution of political literature at the fair and, since it cannot be liable for acts of its agents or officials on a respondeat superior theory, it cannot be held liable for an allegedly unconstitutional policy.

Defendant asserts that the Fair Board had an unwritten policy regarding literature distribution, and the Fair Board, not the County, is the final policy maker for the fair. Defendant further argues that, assuming it can be held liable under § 1983 for unconstitutional policies of the Fair Board, the Fair Board's unwritten booth policy is a constitutional time, place, and manner restriction. Plaintiff responds that defendant is liable for the negligence of the Fair Board in violating his First Amendment free speech and expression rights, citing state law. He argues that the Fair Board's unwritten policy violated his constitutional rights because the policy or practice is arbitrary and discriminatory, not consistent and even-handed.

Under *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 692-94 (1978), municipalities are not liable under respondeat superior principals [sic] for constitutional violations of their employees or agents simply because of the employment/agency relationship. Municipal liability results "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. . . . " *Id.* at 694; *McMillian v. Monroe County*, 520 U.S. 781, 784 (1997). The Court in *McMillian*, 520 U.S. 784-85, determined that, "A court's task is to 'identify those officials or governmental bodies who speak with final policymaking authority for the local government actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.' " (Citation omitted.) The *McMillian* Court held that the inquiry is guided by whether the governmental official is a final policy maker for the local government in

a particular area or on a particular issue, and whether, under state law, the official has final policy making authority. *Id.* at 785-86. "Only municipal officials with 'final policymaking authority' may subject the municipality to § 1983 liability." *Meek v. County of Riverside*, 982 F. Supp. 1410, 1414 (C.D. Cal. 1997) (citation omitted); *Hawkins v. Comparet-Cassani*, 33 F. Supp.2d 1244, 1254 (C.D. Cal. 1999).

Municipal policy may be found in formal or informal policy choices or decisions of municipal officials authorized to make an implement municipal policy. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). "[A] widespread practice that, although not authorized by written law or express municipal policy, [which] is 'so permanent and well settled as to constitute a "custom or usage" with the force of law'" satisfies the requirements of 42 U.S.C. § 1983. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (citation omitted).

Municipal liability results only when a policy or custom is fairly attributable to the municipality as its own, and is the "moving force" behind the particular constitutional violation. *See Monell*, 486 U.S. at 683; *Polk County v. Dodson*, 454 U.S. 312 (1981); *see Board of County Comm'rs v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 1392, *reh'g denied*, 520 U.S. 1283 (1997).

Defendant argues that it cannot be liable for the actions of its agents when the agents were not acting as the final policy maker for the county. Plaintiff admits in his response that the Fair Board is the final policy maker for the Fair, and that the Board of County Commissioners is the final policy maker for Josephine County. In his-

response, plaintiff denies that the Board of Commissioners exercises no power or control over the Fair board of the Fair; and he denies that the County, through the Board of Commissioners, has never adopted any policies or rule regarding the Fair, or to restrict any citizen's first Amendment rights, including plaintiff specifically, to politically campaign at the Fair. However, plaintiff does not cite to, or offer any evidence, to controvert these facts offered by defendant, which are supported by affidavit. At the telephone hearing, plaintiff argued that Mr. Westhoff's deposition testimony, attached to his response, clearly shows that Mr. Westhoff had been delegated policy making authority by the County as to regulation of the fairgrounds, and that Mr. Westhoff had himself implemented unofficial policy on behalf of the County and the Fair Board and is, thus, the chief policy maker in that regard.

Plaintiff asserts in his response that the Fair Board is an agent of Josephine County, relying on *Dundas v. Lincoln County*, 48 Or. App. 1025 (1980). In holding that the county fair board is a county agency and, therefore, the county was liable for the negligence of the fair board, *Dundas* court relied on the statutes governing county fairs, *see* ORS 565.210-565.330. At the time of the *Dundas* incident, the fair board was appointed by the board of county commissioners.[2] *Id.* at 1037 (citing ORS 565.120(2)). The court noted the broad authority of the

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[2] In 1995 and 1996, the fair board was appointed by the court or the board of county commissioners, ORS 565.210(2) (1995, 1996), and in 1997, the fair board was appointed by the court of the county, ORS 565.210(2) (1997).

fair board, and specifically referred to ORS 565.290, which provided that "the decision to hold a county fair is that of 'a county through its county fair board.'" *Id.* at 1038, ORS 565.290, however, was repealed in 1993. The court finds that the *Dundas* case does not aid plaintiff in the determination of whether the Fair Board of the County was the final policy maker for the purposes of Fair policy.

Plaintiff argued at the telephone hearing that the evidence submitted shows that Mr. Westhoff was delegated as the chief policy maker with regard to fair ground regulations by defendant County and had implemented policy on behalf of defendant County. The court has reviewed the record and finds no evidence which would raise an issue of fact on this question. Plaintiff admits that the Fair Board is the final policy maker for the Fair, and that the Josephine County Board of Commissioners is the final policy maker for defendant Josephine County. Despite his argument, he offers no evidence in support of his assertion that Mr. Westhoff is the policy maker for defendant Josephine County.

It appears that, under the principles of *Monell* and *McMillian*, defendant County would not be liable under § 1983 for any policy of the Fair Board, since the evidence shows that the County was not a final policy maker with regard to policies for the Fair. Defendant's motion for summary judgment on this ground is granted.

Assuming, however, that defendant County can be held liable for the policy of the Fair Board relating to handing out literature at the Fair outside of a booth, the second issue raised by defendant County relating to

whether that policy is constitutional, will be addressed by the court. Defendant County contends that the Fair Board's unwritten policy which was applied to plaintiff is a constitutional time, place, and manner restriction under *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). Plaintiff agrees that the analysis regarding constitutional time, place, and manner restrictions for First Amendment rights is set forth in the *Heffron* case. Plaintiff cites *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995), for the proposition that speech such as "handing out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression." However, the Court in *Heffron*, 452 U.S. at 647, states: "It is also common ground . . . that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." (Citations omitted.) In *Heffron*, the Court found that, to constitute a constitutional time, place, and manner restriction for First Amendment purposes, the following must be met: 1) the restriction is not based upon the content or the subject matter of speech; 2) the restriction must serve a significant government interest; and 3) the restriction must leave alternative forums for the expression of protected speech. *Id.* at 648-55. Plaintiff makes no specific argument regarding any of these three requirements. However, while not clear, plaintiff may be challenging the first requirement in arguing the enforcement of the policy at issue is left to the discretion of the Fair manager, Mr. Westhoff. *See id.* at 649. Plaintiff asserts that the oral and unwritten policy or practice relating to distribution of political literature on the fairgrounds, such that he was

removed from the Fairgrounds by Deputy Harmon at the discretion of the fair manager, Mr. Westhoff, is not consistent or evenhanded. Defendant offers the affidavit of Mr. Westhoff, who states that the policy requiring dissemination of literature, brochures, cards, handbills, or products, from a rented Fair booth was applied by the Fair Board evenhandedly, regardless of the content of the literature. The only evidence submitted by plaintiff which seems relevant to this issue is the deposition testimony of deputy Harman that Harman had never removed another individual from the fairgrounds for distributing literature. However, while plaintiff denies that the policy was applied evenhandedly, the court finds that this evidence is insufficient to controvert defendant's evidence and raise a triable issue of fact. Plaintiff fails to offer evidence which raises a genuine issue of fact as to the first requirement of *Heffron* that a restriction not be based upon the content or subject matter of speech. Plaintiff does not challenge either of the other two requirements of *Heffron*.

Plaintiff argues, however, that in *Heffron*, written guidelines or policy enumerated the time, place, and manner restrictions at issue, whereas in this case, there was no written policy in effect at the time of his arrest. Under *Monell*, defendant County would be liable under § 1983 for its policies, customs, or practices–there is no requirement that the policy in dispute be a written policy. That is, under *Monell* and *Praprotnik*, a custom or a practice would not necessarily exist in writing. There is nothing in *Heffron* which indicates that a time, place, and manner restriction must be written to be constitutional. The court finds that the fact that the policy applied in this case was not necessarily a written policy does not mean

that the policy is unconstitutional under the principles of *Heffron*.

Plaintiff asserts that the unwritten policy is arbitrary and discriminatory in violation of his constitutional rights because uncertainty and unbridled discretion has the potential to lead to illegitimate post-hoc rationalizations. Plaintiff argues: "If the officials who are responsible for applying and enforcing the policy do not know of or understand the parameters of the policy, how can the public be expected to know and understand the policy?" (Pl. Resp. at 4.) The evidence before the court, however, shows that the policy at issue was an interpretation of the Exhibitor Contract and was in effect at the time that Mr. Westhoff came to the Fair Board. The evidence shows that the policy was applied to prohibit all distribution of written materials unless it was done from a rented fair booth. There is no indication in the record that Mr. Westhoff did not know or understand the parameters of the policy. To the extent that plaintiff contends that the policy applied to him was vague or overbroad, his contention is rejected.

Plaintiff also asserts that the absence of a written policy fails to give the public and the authorities enforcing the policy, notice of the guidelines and meaning of the policy. Plaintiff admits, however, that he was told by Mr. Westhoff before the date he was arrested that the Fair had a policy prohibiting the distribution of literature or written materials unless it was done from rented fair booth. Therefore, plaintiff was aware of the Fair Board policy before he entered the Fair. The record shows that plaintiff was warned at the fairgrounds by Mr. Westhoff and later

by deputy Harmon that distribution of literature or written materials outside a rented booth violated Fair Board policy. The court finds that the question of notice is not an issue in this case.

Plaintiff fails to offer evidence which would raise a genuine issue of material fact as to whether the Fair Board's policy regarding distribution of written materials other than from a fair booth meets the requirements of *Heffron*. Plaintiff's other contentions regarding the Fair Board's policy are without merit. Accordingly, defendant County's motion for summary judgment on this ground is granted.

IV. ORDER

Based on the foregoing, it is ordered that defendant Josephine County's motion for summary judgment as to the only remaining claim is granted.

DATED this 27 day of May, 1999.

/s/ John P. Cooney
UNITED STATES
MAGISTRATE JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD M. HUBERTY, Plaintiff-Appellant, v. TERRY SOETEBER, Director, Josephine County Juvenile Department; JOSEPHINE COUNTY, a political subdivision of the State of Oregon, Defendants-Appellees.	No. 99-35671 D.C. No. CV-94-03037-JPC ORDER (Filed Jul. 5, 2000)

Before: CHOY, WALLACE, and SKOPIL, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35. Accordingly, the petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

BEFORE THE BOARD OF ARCHITECT EXAMINERS
OF THE
STATE OF OREGON

In the Matter of the Proposed	**]**	**FINAL ORDER**
Assessment of Civil Penalty	**]**	
against DON HUBERTY	**]**	

The Board of Architect Examiners has considered the Proposed Order issued by the Hearings Officer on November 29, 1993. The board adopts the Findings of Fact, Conclusions of Law and the disposition recommended by the Hearings Officers. A copy of the Proposed Order is attached hereto.

NOW THEREFORE, IT IS HEREBY ORDERED that no penalty shall be assessed against Don Huberty.

DATED this 28th day of January, 1994.

OREGON STATE BOARD OF-
ARCHITECT EXAMINERS
Kenneth Nagao, Chairman

Eleanor L. Gundran,
Administrator

NOTICE: You are entities to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review is pursuant to the provisions of ORS 183.482 to the Oregon Court of Appeals.

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"The Grange provides
the opportunity –
The People provide
the leadership –
The Community reaps
the benefits."

[This is a cover to a leaflet distributed without arrest or complaint at the Josephine County Fair in the same building and on the same day that Petitioner was arrested for leafleting. This is an invitation to join a political and social organization.]